NO. 15677

In the

United States Court of Appeals

For the Ninth Circuit

FRANK REINER, *Appellant,*

vs.

NORTHERN PACIFIC TERMINAL COMPANY OF OREGON, a Corporation, *Appellee.*

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

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JURISDICTION

We adopt appellant's statement of jurisdiction.

STATEMENT OF THE CASE

Appellant, as plaintiff in the district court, sued under the Federal Employers' Liability Act (45 USCA § 51) to recover $85,000 general damages for injuries allegedly sustained as a result of defendant's negligence. Defendant's answer denied negligence and charged af-

firmatively that the sole cause of the accident was plaintiff's own negligence. These issues were submitted to the jury, which decided them adversely to the plaintiff, who has appealed.

STATEMENT OF THE EVIDENCE

As in most personal injury cases, the facts were in dispute. Appellant's brief sets forth in narrative form the evidence upon which he relied to sustain a recovery. The weight of evidence supported defendant's contention that plaintiff's negligence was the sole cause of the accident. The court instructed the jury (R. 271):

> "If you should believe from the satisfactory evidence that the plaintiff was guilty of negligence in any one of the particulars charged and that such negligence of plaintiff constituted the sole cause of his injury, then in that event the plaintiff cannot recover against the defendant in this case."

It is clear that the jury, by its verdict, was convinced that plaintiff's negligence was the sole cause of the accident.

The movement which resulted in the accident was a back-up movement of two diesel units. Plaintiff, at the time of the accident, was riding in the rear unit. The testimony established that he himself was responsible for this movement. The complaint alleges (R. 4)

and the answer admits (R. 8) that plaintiff was employed as a pilot-herder. Plaintiff's witness Leap defined a pilot-herder as (R. 105):

> "* * * a classification of a workman for, in this case, the Terminal Company, that pilots or herds the engines"

whose duty it was to keep a lookout and to take a safe course (R. 106) and who is responsible for the safety of the train. (Rule 106—R. 107)

Witness Leo B. Moore testified (R. 151):

> "Q. Now, on the back-up movement who, if anybody, in the back of the unit in which you were riding was responsible for the movement?
>
> A. The herder.
>
> Q. Who would that be in this case?
>
> A. Mr. Reiner.
>
> Q. Who had responsibility for the—strike that —what, if any, authority did you have with respect to Mr. Reiner's duties and activities at that time and place?
>
> A. Nothing at all."

Plaintiff testified at his disciplinary hearing that *it was his duty to protect the train* (R. 77) and to protect the movement at a cross-over (R. 78). Plaintiff's witness Leap testified that plaintiff was obligated to protect the reverse movement (R. 148-149).

Plaintiff's witness Curtis testified that as a pilot-herder, plaintiff should have been alert (R. 138). He should have kept a lookout and protected the rear end (R. 138-139).

During the back-up movement plaintiff was in a position where, had he looked, he would have seen the other train on the track in time to stop the movement. He admitted (R. 71):

> "Q. Were you looking?
>
> A. No."

and (R. 72):

> "Q. Did you take any look at all as you were backing up toward the place where the accident took place?
>
> A. No."

Plaintiff testified that it was raining "pretty badly and you couldn't see through the windshield" (R. 72) —yet he did not turn on either of two windshield wipers in the cab (R. 72).

Plaintiff knew the position of the emergency valve in the cab but did not use it (R. 72). There was, in addition, a communication system to the engineer or

hostler by which he could have signalled the latter to stop the train (R. 72-73):

"Q. Do you know where the emergency valve is on those trains?

A. Yes.

Q. Did you use the emergency valve to stop?

A. No.

Q. Is there a buzzer to the hostler?

A. Yes.

Q. Did you use the buzzer that night?

A. No.

Q. Had you used the buzzer on prior occasions?

A. Yes."

Just one press of the buzzer would have brought the train to a stop (R. 82).

Prior to the back-up movement, the dome light was on, which interfered with visibility to the rear during the back-up movement. Yet plaintiff did not concern himself with this fact and did not turn off the dome light (R. 73, 171).

The diesel unit on the rear was equipped with a headlight which, if it had been on bright beam, would have illuminated the train to the rear of the backing diesel units (R. 169). Yet, plaintiff directed that the

headlight be turned from bright to dim. Witness Moore, referring to plaintiff, testified (R. 150-151):

> "Q. What, if anything was said about the rear headlight?
>
> A. Yes, I walked back, he was sitting there, and where it was—the cab light was on, and then I asked where the headlight switch was as I couldn't see in the row of buttons, and I turned it on bright, and he says, 'You don't make a reverse movement with the bright headlight on,' so I then clicked it to dim.
>
> Q. What, if any, effect would that have upon the visibility to the rear?
>
> A. Well, when the headlight was on bright I could see all the switches all the way back was all clear, and when the headlight was clicked to dim you could only see the car in your unit in front of you."

Again, the jury may well have found that plaintiff's injuries were occasioned solely and entirely by his own negligence in jumping from the diesel unit after the collision was over. The complaint in this case (R. 5) and in the earlier case which was dismissed, his testimony (R. 46, 52 and 53) and his prior written statement (Ex. 26) support this verdict.

Appellant in his statement of facts refers to defendant's Rule 69 and states (Br. 9-10) that it "prohibited power test movements on a main track such as the one on which the two-diesel unit was then being operated."

The fact is that witness Moore testified (R. 169) that *the movement was not a power test*. This was a sharply disputed issue, which was resolved by the jury's verdict.

Appellant has omitted any reference whatsoever to one of the most important facts in the case, and understandably so. The complaint contained the usual allegations of permanent injury and sought to recover money damages for alleged expenditures of large sums of money for medical, hospital and nursing expenses. The latter claim was wholly unsupported by the evidence. Plaintiff's attorney (R. 28) in the opening statement claimed that plaintiff was "permanently and totally disabled," a representation subsequently demonstrated to be entirely false.

Plaintiff concealed from the jury and neglects to advise this court that *he had injured his back on a previous occasion (R. 72), had been treated by an orthopedist, and had worn a back brace for his injury*. The record reveals that he was examined by four doctors, the last only three days before the trial, and only the last doctor testified (R. 70). Plaintiff described a long and continuous period of inability to perform his work. He attempted to convince the jury that it was difficult even for him to move, and that it was difficult for him to walk. (See testimony of plaintiff's wife, Margaret Reiner, R. 145, and his own testimony, R. 69.)

Apart from the usual enthusiasm with which many persons assert their injuries, plaintiff's claim in this case amounted to fraud. For example (R. 69), he actively engaged in salmon fishing subsequent to the accident and won the employees' salmon derby with a 31-pound salmon. He went deer hunting and traveled extensively with his house trailer. The motion pictures exhibited to the jury revealed that plaintiff could and did engage in normal activities without pain, discomfort or limitation of motion. It is significant that plaintiff made no claim and does not now claim that the pictures were unauthentic, distorted or improper. In fact, plaintiff advised his treating orthopedist (R. 200-201) in October of 1955 that he had no pain in his back.

STATEMENT RELATING TO APPELLANT'S SPECIFICATIONS OF ERROR

Plaintiff's specifications of error Nos. 1, 2, 3, 12 and 13 do not present any issue for review by this court.

Answer to Specification No. 4:

The Court did not err in failing to instruct the jury that the defendant was liable as a matter of law.

Appellant has failed to set out the charge to the jury *totidem verbis* as required by Rule 18(2)(d) of this court, nor does the record or appellant's brief disclose

what instruction, if any, was requested by plaintiff or that a proper objection was made (as required by Rule 51 FRCP) after the court had instructed the jury.

Moreover, the evidence that plaintiff was in charge of the back-up movement and was responsible for the safety of the train, and that his negligence was the sole cause of the accident, made such a charge inapplicable.

This Court strictly enforces Rule 51. In *Daulton v. Southern Pacific Company*, 237 F2d 710 (CA9 1956), the court said:

> "Here both sides were represented by lawyers, experts in the field. It is particularly just to apply Rule 51 and the Federal Rules of Procedure * * *." (237 F2d 710 at p. 713)

Plaintiff's attorney, Eugene A. Rerat, is no stranger to F.E.L.A. litigation and can properly be considered an "expert in the field." See *The Atchison, Topeka and Santa Fe Railway Co. v. Jackson*, 235 F2d 390 (CA10 1956).

Answer to Specification No. 5:

The Court did not err in failing to instruct the jury that any contributory negligence on the part of the plaintiff should be considered only in litigation (sic) of damages rather than complete and total defense.

Plaintiff has wholly failed to comply with Rule 18(2)(d) of this Court and Rule 51 FRCP. Plaintiff failed either to request the instruction or to object to the court's instruction at the time of trial. However, the instruction was given (R. 272) and the specification is wholly without merit.

Answer to Specification No. 6:

The Court did not err in receiving evidence over plaintiff's objections that the plaintiff had and was receiving a retirement pension.

This specification of error will be discussed in the argument.

Answer to Specification No. 7:

The Court did not err in instructing the jury: "You will recall that there was evidence further here that the plaintiff is now on a pension. That was received on the sole issue of whether or not in the event you might find (62) him entitled to recover that he would be entitled to recover any loss or not of future earnings. Of course, the fact that a man is on a pension or the fact that a man has other sources of income is not a defense to his right to recover for personal injury, but the fact that a man has other sources of income is relevant to whether or not you might believe that he would have

gone on working had he not been injured, and hence is relevant to the issue of whether or not he has lost any future earnings."

This instruction was requested by plaintiff:

"The Court: * * * I gave the instruction as you suggested. * * *" (R. 280)

This specification of error will be discussed in the argument.

Answer to Specification No. 8:

The Court did not err in failing to instruct the jury to entirely disregard the following portion of the closing argument of defendant's counsel (R. 215): "I have perhaps talked too long. I have tried not to. You have been on juries for a long period of time. You have been here for some time, I know, and you probably have seen people that were hurt, people that were badly hurt, people (160) who had something the matter with them, and I suggest to you that Mr. Reiner has earned a well-deserved rest because he is now pensioned. He can do the things he has always wanted to do. He can hunt and fish all the time, but I don't think, in fairness, that you people should say that we should be penalized or that we are responsible for his condition of permanent

disability when the evidence is uncontradicted that he hurt his back a long time ago. Thank you."

No request was made to instruct the jury to disregard that portion of counsel's argument, and no objection was made to the argument at the time of trial. This specification is no more than an afterthought.

Answer to Specification No. 9:

The Court did not err in failing to instruct the jury to entirely disregard the statement in the closing argument as follows (205-206): "I can understand why they brought Mr. Rerat back here from Minneapolis because he certainly makes a beautiful argument to you people" as being an appeal to local passion and prejudice.

The Court was not requested by plaintiff to instruct the jury to disregard that portion of counsel's argument, and no objection was made to the argument at the time of trial.

Answer to Specification No. 10:

That the Court did not err in denying plaintiff's objections to the following portion of the closing argument of the defendant's counsel and the plaintiff's request that the jury be instructed to disregard (R. 212): "Is there some reason why we have had one, two lawyers from Minneapolis, one from Seattle, one from Portland, trying this case for the plaintiff with large photographs,

aerial views, blown-up things like those claims in a complaint for considerable sums of money, for doctor and hospital bills when there is no justification or reason for it?

Mr. Rerat: Just a minute counsel. I want to object to such testimony on the grounds it is prejudicial, your Honor, and ask that the jury be instructed to disregard it.

The Court: Proceed (157)."

as an appeal to local passion and prejudice and as permitting defendant's counsel to comment on the attorneys who were not actually participating in the trial.

This specification of error will be discussed in the argument.

Answer to Specification No. 11:

The Court did not err in failing to instruct the jury that there was a difference between a "pilot-herder" and a "pilot" and as to the respective responsibilities of a "pilot-herder" and a "pilot," as was shown by the Record.

The Court was not requested by plaintiff to instruct the jury regarding the difference, if any, between a "pilot-herder" and a "pilot." Plaintiff has again wholly ignored Rule 18(2)(d) of this Court and Rule 51 FRCP.

SUMMARY OF ARGUMENT

A. Evidence of Retirement

The evidence relating to plaintiff's retirement was entirely proper and was offered solely for the purpose of impeachment to establish that plaintiff had no incentive or desire to return to work.

B. Jury Argument

The trial court did not abuse its discretion in permitting an argument to the jury which consisted of a fair appraisal and evaluation of the case as it related to plaintiff's attempt to "build up" both liability and damages.

C. Liability as a Matter of Law

The issues upon liability, i.e., negligence and contributory negligence, were for the jury's determination.

D. Alleged Misconduct

No objection was made prior to the verdict.

ARGUMENT

Evidence of Retirement. The question was:

> "Q. Mr. Reiner, you have retired at the present time, haven't you?" (R. 68)

"Retirement," according to Webster's New International Dictionary (2d Ed), means, "to withdraw from office, public station, business, or the like * * *." The term has been defined as meaning to "withdraw from active service." *State Ex rel v. Love*, 95 Neb. 573 at p. 581, 145 NW 1010.

Plaintiff complains, because he was asked if he had "withdrawn from active service." If he had voluntarily withdrawn from active service, such position would be totally inconsistent with his assertion at the trial that he wanted to but could not work, because of his alleged permanent and total disability resulting from the accident.

The information which defendant wished to elicit was offered solely for the limited purpose of impeaching the plaintiff by showing that he no longer desired to carry on his employment with the terminal company. It was offered to establish that his incentive to work was gone.

After it was made known that plaintiff had voluntarily withdrawn from service, the court instructed the jury (R. 69):

> "The Court: Well, the jury will understand that whether a man is retired on a pension or not has nothing to do with whether or not he is entitled to recover in a suit such as this. In any event, if you find that he is entitled to recover, this has nothing to do with the amount he is entitled to recover."

There was no objection to this instruction at that or any other time, nor was there any request for any other or different instruction on the subject.

Plaintiff claimed total and permanent disability, when in truth and in fact, the evidence demonstrated that he was not disabled. He called himself a cripple; yet the evidence demonstrated him to be an active hunter and fisherman who could engage in every-day activities with no disability whatsoever.

The defendant was entitled to go into the question whether plaintiff had any genuine desire to return to work, and to unmask plaintiff's attempt to hoodwink the jury (by feigned painful gestures and halting walk) into believing he was totally and permanently disabled, and that he had left defendant's employment by reason of these injuries.

The testimony relating to retirement was offered for the limited purpose of impeachment. It was not offered with respect to liability or damages. The court immediately and expressly instructed the jury that it was not received in connection with either of those two issues, and again, in accordance with plaintiff's attorney's request, the court, in its charge to the jury, repeated its admonition (R. 274).

The cases cited by appellant are all cases in which evidence of benefits under the Railroad Retirement Act

—and there was no reference in this case to the Railroad Retirement Act—was received *in order to mitigate damages*. The law is well settled that evidence of benefits received by an injured workman, regardless of the source, is not admissible to mitigate damages. Evidence of plaintiff's retirement in this case *was not offered to mitigate damages*, but was offered solely for the purpose of impeaching the suggestion that he left defendant's employment because of his injuries.

Any error (which is emphatically denied) could relate only to damages. Since the jury found no liability such suggested error is immaterial. See *Dow v. United States Steel Corp.* (3 Cir. 1952), 195 F2d 478—Jones Act; *Tracy v. Terminal R. Ass'n of St. Louis* (8 Cir 1948), 170 F2d 635—F.E.L.A.; *Daulton v. Southern Pacific Company* (9 Cir. 1956), 237 F2d 710 (Cer. Den.)—F.E.L.A.

Jury Argument. Little is needed to justify the argument which was made to the jury. Certainly the conduct of the trial is within the discretion of the trial court. It was obvious that plaintiff had exaggerated and distorted the evidence relating to liability and his injuries. The argument of which complaint is made refers to the number of lawyers and their locality. It will be remembered that plaintiff had even been sent to Seattle for a medical examination. The comments

were directed to the attorneys who were in evidence at the time of trial and the type of evidence introduced by them and the wholly unfounded claim for doctor and hospital bills.

There was no appeal to local passion or prejudice. Appellant in his brief complains because this was a comment upon the attorneys who were not actually participating in the trial. Mr. Lezak from Portland did participate during trial (R. 257) and it is not and will not be denied that Mr. Bardo, Mr. Rerat's associate from Minneapolis, and Mr. Owen A. Johnson from Seattle, the latter whose name appears as an attorney of record (R. 1) were in the courtroom assisting Mr. Rerat.

Liability as a Matter of Law. The authorities upon which plaintiff relies do not support his contention. In each case, the court held that the issues were properly determined by the jury. For example, in the case of *Frabutt v. New York, C & St. L. R. Co.* (DC Pa. 1950), 88 F.Supp. 821, we find this language at page 828:

> "The questions of defendant's negligence and the deceased's contributory negligence was therefore necessarily for the jury, and it appears to me proper that the motion for directed verdict and for judgment notwithstanding the verdict should be denied."

and in the case of *Chesapeake & O. Ry. Co. v. Richardson* (6 Cir. 1941), 116 F2d 860, cert. den. 313 U.S. 574, we find at page 864:

> "The questions of assumed risk or appellee's negligent act being the sole cause of his injury were for the jury."

The essence of the jury's function is to select from among conflicting inferences that which *it* considers most reasonable. *Eastman v. Southern Pacific Company* (9 Cir. 1956), 233 F2d 615 at 618.

In *Daulton v. Southern Pacific Company* (9 Cir. 1956), 237 F2d 710, cert. den., the case was tried to a jury. In affirming the jury's verdict for the defendant, this court stated, at page 712:

> "In view of the usual verdict returned for the plaintiff in cases of this type, it is surprising that the jury in this case did return a verdict for the railroad company. But it did. Now the plaintiff appeals."

and at page 713:

> "The lesson seems to be in Schulz v. Pennsylvania Railroad Co., 350 U.S. 523, 76 S.Ct. 608, that the jury can choose any reasonable hypothesis and that the rule works both ways."

Here, the evidence was disputed. The jury found no liability. The jury's verdict cannot be disturbed.

Alleged Misconduct—Investigation and Discipline

Plaintiff was asked about the company's investigation and the discipline imposed upon him by the company. The question was asked and *plaintiff's objection was sustained*. There was no motion for mistrial. It is obvious from the record (R. 74, et seq.) that the reference was made only to identify the hearing where plaintiff was represented by his brotherhood representative and where he made prior inconsistent statements. This specification is clearly an afterthought.

CONCLUSION

An examination of the record of this case will demonstrate that plaintiff has had a fair trial.

Respectfully submitted,

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